Pentamaster Smart Solution Sdn Bhd v Velocity Electrical Engineering Sdn Bhd and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS WA-22C-107–12 OF 2019 AND WA-22C-5–01 OF 2020
ALIZA SULAIMAN J
28 SEPTEMBER 2020

Civil Procedure — Pleadings — Amendment — Plaintiff applied to amend re-amended writ and re-amended statement of claim — Whether application and proposed amendments made bona fide — Whether defendant would suffer prejudice — Rules of Court 2012 O 20 r 5(1)

The plaintiff appointed the defendant as the nominated subcontractor to carry out certain works for a project ('the project'). The plaintiff alleged that the defendant did not complete the works within the extended completion date and had abandoned the construction site without terminating the subcontract. The plaintiff also claimed that the works done by the defendant were incomplete, of poor workmanship and defective and that the defendant had failed and/or unreasonably refused to clear the debris found at the site. Hence, the plaintiff claimed against the defendant for, inter alia: (a) liquidated and ascertained damages for the delay in completing the project; and (b) sums and damages for the defendant's breach of contract. The defendant counterclaimed for general damages at the Kota Bharu High Court ('Suit No 5') but was transferred to the Kuala Lumpur High Court. The plaintiff's claim ('Suit No 107') and Suit No 5 were then transferred to the construction court. The writ and statement of claim ('SOC') in Suit No 107 were amended twice, on 17 January 2020 by way of O 20 r 3(1) of the Rules of Court 2012 ('the ROC 2012') and on 17 March 2020 by way of O 20 r 12(1) of the ROC 2012. The plaintiff applied, vide a notice of application (encl 18), to amend their re-amended writ and re-amended SOC pursuant to O 20 r 5(1) of the ROC 2012 and/or under the inherent jurisdiction of the court. The plaintiff contended that the application was made at the early stage of the proceedings as the matter had not been set down for trial and the parties had not exchanged any pre-trial documents or complied with any pre-trial directions. The defendant submitted that: (a) the application and the proposed amendments were not made bona fide as they were intended to rectify the plaintiff's claim upon materials obtained from the defendant; (b) the application was a tactical manoeuvre and merely an attempt at delaying the court proceedings; and (c) the defendant would suffer prejudice which could not be compensated with costs if the amendments were allowed.

Held, dismissing the application with costs:

(1) The plaintiff's application was not bona fide. The proposed amendments would be of no use because the proposed amendments added nothing to the plaintiff's case and was akin to the plea that was put forth by the defendant. The fact which the plaintiff sought to introduce was not new and was discoverable from the start of the plaintiff's case. The plaintiff failed to plead the same and upon sighting the defendant's pleading, had now decided to apply to amend the re-amended SOC, five and a half weeks after being served with the amended defence and counterclaim (see paras 17–18).

(2) The plaintiff having invoked O 20 r 3(1) and 12(1) of the ROC 2012 to twice amend the SOC, appeared to be bent on having recourse to all rules available under the ROC 2012 to amend the SOC and by doing so, was putting their case in a piecemeal manner. The directions for the filing of pre-trial documents for Suit No 5 had been given since 3 February 2020. The pre-trial documents could not be finalised until pleadings in Case No 12 had closed since, with the exception of the bundle of pleadings for each suit, the court had directed that only one set of pre-trial documents were to be prepared for both suits as they had been consolidated and would be tried together. In addition, trial dates had not been set for the suits owing to the same reason. Therein laid the injustice and prejudice to the defendant (see para 22).

[Bahasa Malaysia summary

Plaintif melantik defendan sebagai subkontraktor yang dinamakan untuk melaksanakan kerja-kerja tertentu untuk satu projek ('projek'). Plaintif mendakwa bahawa defendan tidak menyiapkan kerja-kerja tersebut dalam jangka masa siap yang dilanjutkan dan telah meninggalkan tapak pembinaan tanpa menamatkan subkontrak. Plaintif juga mendakwa bahawa kerja-kerja yang dilakukan oleh defendan tidak lengkap, kualiti kerja yang rendah dan cacat dan bahawa defendan telah gagal dan/atau secara tidak wajar enggan membersihkan sampah yang terdapat di tapak tersebut. Oleh itu, plaintif menuntut terhadap defendan untuk, antara lain: (a) ganti rugi tertentu dan ditetapkan kerana kelewatan menyiapkan projek; dan (b) sejumlah wang dan ganti rugi atas pelanggaran kontrak oleh defendan. Defendan menuntut balas untuk ganti rugi am di Mahkamah Tinggi Kota Bharu ('Guaman No 5') tetapi dipindahkan ke Mahkamah Tinggi Kuala Lumpur. Tuntutan plaintif ('Guaman No 107') dan Guaman No 5 kemudian dipindahkan ke mahkamah pembinaan. Writ dan pernyataan tuntutan ('SOC') dalam Guaman No 107 telah dipinda dua kali, pada 17 Januari 2020 melalui A 20 k 3(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan pada 17 Mac 2020 melalui A 20 k 12(1) KKM 2012. Plaintif memohon, melalui notis permohonan (lampiran 18), untuk meminda writ yang dipinda semula dan SOC yang dipinda semula berdasarkan A 20 k 5(1) KKM 2012 dan/atau di bawah bidang kuasa mahkamah sedia ada. Plaintif berpendapat bahawa

permohonan itu dibuat pada tahap awal prosiding kerana perkara tersebut belum ditetapkan untuk diadili dan pihak-pihak belum bertukar dokumen pra-perbicaraan atau mematuhi sebarang arahan pra-perbicaraan. Defendan berhujah bahawa: (a) permohonan dan pindaan yang dicadangkan tidak dibuat bona fide kerana bertujuan untuk memperbaiki tuntutan plaintif atas material yang diperoleh daripada defendan; (b) permohonan itu adalah pergerakan taktikal dan hanya percubaan untuk menangguhkan prosiding mahkamah; dan (c) defendan akan mengalami prejudis yang tidak dapat diganti dengan kos jika pindaan itu dibenarkan.

Diputuskan, menolak permohonan dengan kos:

(1) Permohonan plaintif adalah tidak bona fide. Pindaan yang dicadangkan tidak akan berguna kerana pindaan yang dicadangkan tidak menambahkan apa-apa kepada kes plaintif dan berkaitan dengan permohonan yang diajukan oleh defendan. Fakta yang dipohon oleh plaintif bukanlah perkara baru dan dapat ditemui sejak awal kes plaintif. Plaintif gagal mengemukakan hal yang sama dan setelah melihat permohonan defendan, kini telah memutuskan untuk memohon untuk meminda SOC yang dipinda semula, lima setengah minggu setelah diserahkan dengan pembelaan dan tuntutan balas yang dipinda (lihat perenggan 17–18).

(2) Plaintif yang telah membangkitkan A 20 k 3(1) dan 12(1) KKM 2012 untuk dua kali meminda SOC, nampaknya cenderung menggunakan semua peraturan yang ada di bawah KKM 2012 untuk meminda SOC dan dengan melakukannya, meletakkan kes mereka sedikit demi sedikit. Arahan untuk memfailkan dokumen pra-perbicaraan untuk Guaman No 5 telah diberikan sejak 3 Februari 2020. Dokumen pra-perbicaraan tidak dapat diselesaikan hingga permohonan dalam Kes No 12 ditutup kerana, dengan pengecualian ikatan pliding untuk setiap tuntutan, mahkamah telah mengarahkan agar hanya satu set dokumen pra-perbicaraan yang harus disediakan untuk kedua-duanya kerana telah digabungkan dan akan dibicarakan bersama. Di samping itu, tarikh perbicaraan belum ditetapkan untuk tuntutan kerana alasan yang sama. Di situ terdapat ketidakadilan dan prejudis terhadap defendan (lihat perenggan 22).]

Cases referred to

ASM Development Sdn Bhd v Hijjas Kasturi Associates Sdn Bhd [2011] 6 MLJ 228, CA (refd)

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997] 1 MLJ 629, CA (refd)

Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor [2009] 4 MLJ 833, CA (refd)

A *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 1 WLR 1514, HL (refd)
Bodco Engineering and Construction Sdn Bhd v Tribunal For Housing Purchaser Claims & Ors [2017] 4 MLJ 501, CA (refd)
Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party) [2016] 4 MLJ 100; [2016] 4 CLJ 831, CA (refd)
B *Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin* [2014] 1 MLJ 911, HC (refd)
Eshah binti Sa' at v Meriam binti Sa' at & Ors [1975] 2 MLJ 97 (refd)
Everise Hectares Sdn Bhd v Citibank Berhad [2010] MLJU 1379; [2011] 2 CLJ 25, CA (refd)
C *HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd* [2004] 4 MLJ 398, CA (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230, SC (refd)
Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (distd)
D *Khairy Jamaluddin v Dato' Seri Anwar Ibrahim* [2015] 3 CLJ 1062, CA (refd)
Kintown Contractor Sdn Bhd v Tometa-Mira Concrete Sdn Bhd [2015] MLJU 794, HC (refd)
Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd [2016] MLJU 1857; [2016] 4 CLJ 438, HC (refd)
E *Lee Ah Lan v Lee Kim Lan Constructions Industries Sdn Bhd & Anor* [2003] 1 MLJ 409, HC (refd)
Lim Nyuk Foh v Jamili bin Muhiman [2010] MLJU 1628, HC (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)
F *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, CA (refd)
National Coal Board v WM Neill & Son (St Helens) Ltd [1984] 1 All ER 555, QBD (refd)
Ponnusamy & Anor v Nathu Ram [1959] 1 MLJ 228; [1959] 1 LNS 73 (refd)
G *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (refd)
Suhaili bin Ismail v Syarikat Sribima Sdn Bhd [2015] 6 MLJ 556, CA (refd)
Wong Ah Hee @ Wong Ah Mooi & Anor v Low Tuck Hoong [1993] MLJU 183, HC (refd)
H *YB Datuk Dr Soon Choon Teck v YB Datuk Robert Lau Hoi Chew & Ors* [2009] 3 MLJ 785, CA (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

I **Legislation referred to**

Rules of Court 2012 O 20 rr 3(1), 5(1), 5(5), 12(1), O 34

Ho Hui Ying (YC Wong) for the plaintiff.
Sharifah Alliana Idid (YS Ling & Co) for the defendant.

Aliza Sulaiman J:

[1] The plaintiff had, vide a notice of application ('NoA') filed on 7 July 2020 (encl 18), applied to amend their re-amended writ and re-amended statement of claim ('SoC') both dated 17 March 2020 pursuant to O 20 r 5(1) of the Rules of Court 2012 ('the RoC 2012') and/or under the inherent jurisdiction of the court.

[2] Having read the related affidavits and written submissions and having heard oral submissions by learned counsels representing the parties via remote hearing on 1 September 2020, I had dismissed the plaintiff's application with costs in the cause.

[3] I now give my full reasons for the decision.

BRIEF FACTS

[4] The plaintiff was the nominated subcontractor for the supply, delivery, installation, testing and commissioning of electrical and extra low voltage installation for the project known as 'Cadangan Membina dan Menyiapkan Projek 'Alwaqf' di atas Lot PT775, Tanah Milik Perbadanan Menteri Besar Kelantan, Seksyen 67, Mukim Kota, Daerah Kota, Jajahan Kota Bharu, Kelantan Darul Naim Fasa 1 (Lot Komersil) — 99 Unit Lot Komersil 5 Tingkat Beserta 1 Tingkat Basemen Tempat Letak Kereta (TLK), Fasa 2 (1 Blok Pangsapuri Servis 13 Tingkat) — 443 Unit Suites, 24 Unit Suites 1 Bilik, 38 Unit Suites 2 Bilik, Fasa 3 (Kompleks Perniagaan) — 256 Unit Lot Kompleks Perniagaan 3 Tingkat Beserta 1 Tingkat Basemen Tempat Letak Kereta (TLK), Taman Atas Bumbung, Dewan Konvensyen, Cineplex, Food Village dan Musolla Beserta Pusat Riadhah dan Kolam Renang Atas Bumbung Serta Lain-lain Kemudahan' ('said project'). The main contractor for the said project is Cosmo Property Management Sdn Bhd.

[5] By a letter of nomination of subcontractor dated 25 July 2015, the plaintiff appointed the defendant as the nominated subcontractor for the said project at a contract sum of RM7,651,364.

[6] The plaintiff alleged that the defendant did not complete the works within the extended completion date of December 2018 and had abandoned the construction site without terminating the subcontract on 31 May 2019. Apart from the issue of delay, the plaintiff also claimed that the works done by the defendant were incomplete, of poor workmanship and defective and that the defendant had failed and/or unreasonably refused to clear the debris found at the site.

A [7] Hence, the plaintiff's claims against the defendant comprise of:

(a) the sum of RM1,365,000 being liquidated and ascertained damages ('LAD') for the defendant's delay in completing the said project calculated at RM15,000 per day for 91 days and continuing together with interest thereon;

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(b) the sum of RM1.5m plus such other additional and continuing costs to be assessed by the court for the defendant's breach of contract in failing to complete the works and rectify the defective works;

C (c) the sum of RM150,000 or any other sum as deemed fit and proper by the court for the defendant's breach of contract in failing to clear the debris;

(d) an amount to be assessed by the court for the defendant's breach of contract in failing to complete the scope of works;

D

(e) general damages for breach of contract; and

(f) costs.

E **[8]** The defendant counterclaimed that it is entitled to be paid and/or compensated for the works that had been completed based on the principle of *quantum meruit* as the conduct of the parties show that the contract period had been extended. The defendant thus claims for general damages to be assessed by the court, interest and costs.

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[9] The plaintiff initially filed their writ in NCvC of the Kuala Lumpur High Court on 18 November 2019 whilst the SoC was filed on 10 December 2019. The NCvC then transferred the case to the construction court on 16 December 2019 on the basis that the claim involves a construction matter and became known as Civil Suit No WA-22C-107–12 of 2019 ('Suit No 107').

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[10] As for Civil Suit No WA-22C-5–01 of 2020 ('Suit No 5'), the defendant had filed their claim at the High Court in Kota Bharu, Kelantan on 8 October 2019. That suit was subsequently transferred to the Kuala Lumpur

H High Court and registered in the NCvC on 28 December 2019. On 23 January 2020, the NCvC transferred that case as well to the construction court.

[11] The writ and SoC in Suit No 107 were amended twice, on 17 January

I 2020 (by way of O 20 r 3(1) of the RoC 2012 which provides that 'A party may, without the leave of the court, amend any pleading of his once at any time before the pleadings are deemed to be closed ...') and 17 March 2020 (by way of O 20 r 12(1) of the RoC 2012 which provides that 'Notwithstanding the provisions of this Order, any pleading in any cause or matter may, by written

agreement of all parties, be amended before commencement of the trial.'). A

THE PROPOSED AMENDMENTS

[12] The proposed amendments to the re-amended writ and re-amended SoC were enclosed to the NoA as encl A and encl B, respectively. B

[13] The proposed amendments to the re-amended writ are basically to the prayers in the section on the endorsement of the claim. The proposed amendments to the relevant paragraphs in the re-amended SoC are shown below (strikethrough and underlined): C

(a) para 3:

> A company known as Cosmo Property Management Sdn Bhd ('Cosmo') is and was at all times material to this action the main contractor in respect of a project known as ...; D

(b) para 4:

> The plaintiff is and was at all times material to this action the nominated subcontractor for supply, delivery, installation, testing and commissioning of electrical and extra low voltage installation for the project; E

(c) para 7:

> Pursuant to cl 4 of the subcontract, the defendant is to pay to the plaintiff liquidated and ascertained damages at the rate of RM15,000 per day in the event the work is not completed by the completion date, or, if any extension of the completion date has been given, by such extended completion date; F

(d) sub-para 7.1:

> By an engineer's instruction dated 24 October 2016 to, inter alia, the plaintiff and the defendant, the mechanical and electrical consultant of the project, United Premier Consultants Sdn Bhd ('UPC') extended the completion date to December 2018 ('the extended completion date'); G

(e) para 8:

> The defendant did not complete the work by the extended completion date and abandoned the site without terminating the subcontract on 31 May 2019; H

(f) para 9:

> By a certificate of non-completion dated 2 July 2019, ~~*the mechanical and electrical consultant of the project, United Premier Consultants Sdn Bhd*~~ UPC certified that the defendant's delay was three months, ie 91 days. The plaintiff avers that the defendant's delay was actually more than three months, but accepts UPC's decision. Accordingly, the plaintiff is entitled to claim against the defendant liquidated and ascertained damages in the sum of I

RM1,365,000 and continuing until completion of the project ...;

(g) sub-para 17.1:

An order that the defendant do pay to the plaintiff the following sums:

(h) the sum of RM1,365,000 being liquidated and ascertained damages for the defendant's delay in completing the project or such sum determined by this honorable court being liquidated and ascertained damages ('the said sum');

(i) interest on ~~*RM1,365,000*~~ the said sum at the rate of 5%pa calculated from 2 ~~*April*~~ July 2019 until the date of judgment;

(j) Interest on paragraphs (a) and (b) above at the rate of 5%pa calculated from the date of judgment until full realization.

THE PLAINTIFF'S SUBMISSIONS

[14] The plaintiff urged this court to allow the application in encl 18 on the following grounds:

(a) under O 20 r 5(1) of the RoC 2012, the court can grant leave to amend the pleadings at any stage of the proceedings and based on the decisions in *YB Datuk Dr Soon Choon Teck v YB Datuk Robert Lau Hoi Chew & Ors* [2009] 3 MLJ 785 and *Suhaili bin Ismail v Syarikat Sribima Sdn Bhd* [2015] 6 MLJ 556, the general principle is that leave to amend is readily given at any stage of the proceedings, however late, provided that no injustice is caused to the parties;

(b) the plaintiff has satisfied the principles laid down in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 in that no injustice is caused to the parties by allowing the amendments, in particular:

(i) the application was bona fide. The proposed amendments are made based on the existing facts and consistent with the plaintiff's re-amended SoC which is already before this court. The proposed amendments are said to be necessary for the real issues in dispute in respect of the plaintiff's claim for LAD to be fully and finally determined by the court and are primarily to plead facts in relation to the extended completion date for the defendant to complete its works under the subcontract which have already been pleaded in the amended defence and counterclaim, and amended reply to amended defence and amended defence to counterclaim (encl 17);

(ii) any prejudice caused to the defendant can be compensated by costs. The proposed amendments pertaining to the extended completion date are within the defendant's knowledge as exemplified by the defence and counterclaim dated 6 January 2020 (encl 8); amended

defence and counterclaim dated 27 May 2020 (encl 16); and defendant's affidavit in reply ('AIR') to the plaintiff's amendment application (encl 21). The case of *Lee Ah Lan v Lee Kim Lan Constructions Industries Sdn Bhd & Anor* [2003] 1 MLJ 409 was cited to support this ground; and

(iii) the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. Furthermore, it was argued that the proposed amendments will not alter or introduce any new cause of action. Legally, leave to amend can be granted even if the effect of the amendment were to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts. The plaintiff relied on O 20 r 5(5) of the RoC 2012 and the cases of *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629; *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; and *ASM Development Sdn Bhd v Hijjas Kasturi Associates Sdn Bhd* [2011] 6 MLJ 228 for this proposition. In any event, the plaintiff claimed that the defendant has conceded in para 10 of their AIR (encl 21) that the proposed amendments will not add anything to the facts of this case.

(c) there is no inordinate delay on the part of the plaintiff as the application was filed prior to the filing of pre-trial documents and before this action is set for trial. Ms HY Ho submitted that delay, if any, does not equal to prejudice and that the defendant will suffer no prejudice if this application is allowed by the court. However, citing the case of *Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor* [2009] 4 MLJ 833, the plaintiff would suffer great prejudice and injustice if the proposed amendments are disallowed.

THE DEFENDANT'S SUBMISSIONS

[15] For the defendant, Ms Sharifah Alliana Idid forcefully submitted that the requirements set out in both *Yamaha Motor Co Ltd* and *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1 have not been fulfilled due to the following reasons:

(a) the application and the proposed amendments therein were not made bona fide or in good faith as they are intended to rectify the plaintiff's claim upon material obtained from the defendant. The defendant highlighted that the plaintiff has shown a tendency to amend their pleading upon sighting new facts and/or particulars pleaded by the defendant, presumably to strengthen their case and/or to simply delay the proceedings;

(b) the application is a tactical manoeuvre and merely an attempt at delaying the court proceedings. Additionally, no reasonable explanation was given by the plaintiff for the delay and reliance was placed on the decision in *Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2016] MLJU 1857; [2016] 4 CLJ 438; and

(c) the defendant will suffer prejudice which cannot be compensated with costs if the amendments are allowed.

FINDINGS AND PRONOUNCEMENT OF THE COURT

[16] The plaintiff's application is made pursuant to O 20 r 5(1) of the RoC 2012 which reads as follows:

> 5 Amendment of writ or pleading with leave (O 20 r 5)
>
> (1) Subject to O 15 rr 6, 6A, 7, and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.

[17] By virtue of this rule, the court may give leave to a party to amend his pleading at any stage of the proceedings provided that no injustice is caused to the parties. In determining whether injustice would be caused to the parties, the learned counsels in this case have correctly cited the principles as laid down by the apex court in *Yamaha Motor* since the plaintiff's application in encl 18 was made before the trial has commenced. This is to be contrasted with the facts in the case of *Hong Leong Finance Bhd* where the defendant filed the application to amend the defence and a counterclaim on the eve of the trial. The Federal Court held that when an application to amend a pleading is made at such a late stage, the principles in *Yamaha Motor* ought not to be the sole consideration. David Wong Dak Wah JCA (as he then was) had referred to the two aforesaid authorities in *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100 at p 108; [2016] 4 CLJ 831 at p 837 and summarised the principle in *Yamaha Motor* as ' ... that is as long as the amendment of the pleadings is bona fide and does not prejudice the opposing party, the application ought to be granted as the opposing party can be compensated with costs'.

[18] In the instant case, I had given due consideration to the NoA and proposed amendments, affidavits and written submissions filed as well as the oral submissions by learned counsels representing the parties. It is my finding that the plaintiff's application was not bona fide for the following reasons:

(a) in the case submitted by the defendant namely, *Ponnusamy & Anor v Nathu Ram* [1959] 1 MLJ 228; [1959] 1 LNS 73, it was held that in dealing with an application to amend the pleadings, the court should consider the materiality

and the effectiveness of the amendment. It is a well-established practice not to allow an amendment where it appeared that such an amendment would be useless. The court should look at the probable consequences of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made. This well-known principle as enunciated by Good J in the Ipoh High Court was cited and approved by the Court of Appeal in *HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd* [2004] 4 MLJ 398 (see too, the judgment of the Court of Appeal in *Everise Hectares Sdn Bhd v Citibank Berhad* [2010] MLJU 1379; [2011] 2 CLJ 25 and the decisions of the High Court in *Eshah binti Sa'at v Meriam binti Sa'at & Ors* [1975] 2 MLJ 97; *Wong Ah Hee @ Wong Ah Mooi & Anor v Low Tuck Hoong* [1993] MLJU 183; *Lim Nyuk Foh v Jamili bin Muhiman* [2010] MLJU 1628; *Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin* [2014] 1 MLJ 911 and *Kintown Contractor Sdn Bhd v Tometa-Mira Concrete Sdn Bhd* [2015] MLJU 794 where reference was made to *Ponnusamy*'s case). The Court of Appeal in *Khairy Jamaluddin v Dato' Seri Anwar Ibrahim* [2015] 3 CLJ 1062 had also referred to *Ponnusamy* and *HSBC Bank Malaysia* in addressing the submission for the defendant in the following excerpt from the judgment:

> [37] Finally, we will address learned counsel for the defendant's argument that the correct judicial approach is not to dismiss the application to amend but to allow it giving the defendant a chance to make the proposed amendments on the condition that the particulars that were said to be lacking are pleaded in the amended defence that is ultimately filed in respect of the application. We appreciate the general rule with regard to amendment, that is, the court should lean towards allowing amendments to be made to the pleadings to make them clear and to put before the court all the material facts on the issue or issues that require the court's determination. However the court's discretion to do so must be exercised judiciously. The court must be satisfied that the proposed amendments have passed all the legal requirements and are not prejudicial to the party against whom the amendments are to be made. In other words the court must also consider the materiality and effectiveness of the amendments — see *Ponnusamy & Anor v Nathu Ram* [1959] 1 MLJ 228; [1959] 1 LNS 73 and *HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd* [2004] 4 MLJ 398; [2004] 3 CLJ 121 referred to by the learned High Court judge in her written judgment ...

It was finally held that there was a clear lack of bona fide in the pursuit of the proposed amendments by the defendant in that case.

(b) applying the said legal principle to the case before me, it is my considered view that the proposed amendments would be of no use because:

(i) the proposed amendments to paras 3 and 4 of the re-amended SoC add nothing to the plaintiff's case since the defendant has, in para 2 of the amended defence and counterclaim admitted the fact that Cosmo Property Management Sdn Bhd is the main contractor and the plaintiff is the subcontractor for the said project;

(ii) the proposed amendments to para 7 of the re-amended SoC is akin to

the plea that was put forth by the defendant in para 4 of its amended defence and counterclaim which, among others, reads '... Defendan turut memplidkan bahawa, berdasarkan klausa 4, perjanjian subkontrak tersebut, sekiranya terdapat lanjutan kepada tarikh siap tersebut ('tarikh siap lanjut'), kiraan gantirugi jumlah tertentu adalah di kira dari tarikh siap lanjut tersebut'. The plaintiff then replied in para 2 of encl 17 that 'Plaintif menafikan perenggan 4 pembelaan terpinda defendan setakat mana ia menyatakan bahawa gantirugi jumlah tertentu yang dituntut oleh plaintif adalah tidak munasabah, tidak logik dan tidak sah di sisi undang-undang. Plaintif mempunyai hak untuk menuntut gantirugi jumlah tertentu tersebut daripada defendan berdasarkan kadar yang ditetapkan dalam subkontrak tersebut yang yang merupakan suatu pra anggaran gantirugi yang tulen berdasarkan jumlah gantirugi yang perlu dibayar kepada pihak-pihak berkaitan dan kepentingan-kepentingan sah yang perlu dilindungi. Lebih-lebih lagi, kerugian sebenar yang ditanggung oleh plaintif disebabkan kelewatan defendan dalam menyiapkan kerja-kerjanya adalah lebih daripada gantirugi jumlah tertentu yang dituntut tersebut'.

In this regard, I agree with the submission by the defendant's counsel that the fact which the plaintiff seeks to introduce via para 7 of the re-amended SoC is not new and is discoverable from the start of the plaintiff's case as it concerns a term of the subcontract. However, the plaintiff failed to plead the same and upon sighting the defendant's pleading, has now decided to apply to amend the re-amended SoC, five and a half weeks after being served with the amended defence and counterclaim. What is more pertinent is that the pleading relates to a clause in the subcontract, the meaning and interpretation of which involves a question of law which would have to be determined by the court (see the decisions of the Court of Appeal in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38 at pp 44–45 citing the judgment of Lord Diplock in *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 1 WLR 1514; and in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357 at p 363 and *Bodco Engineering and Construction Sdn Bhd v Tribunal For Housing Purchaser Claims & Ors* [2017] 4 MLJ 501 at p 517 where reference was made to the case of *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995 wherein the court cited the case of *National Coal Board v WM Neill & Son (St Helens) Ltd* [1984] 1 All ER 555). As acknowledged by the plaintiff, the facts in relation to the extended completion date for the defendant to complete the works under the subcontract have been pleaded in the amended defence and counterclaim, and encl 17. This would suffice for purposes of placing the issues in dispute in respect of the plaintiff's claim for LAD to be finally decided by the court;

(iii) the proposed amendments to paras 7.1 and 8 of the re-amended SoC are a reflection of para 5(c) in the defence and counterclaim which was filed on 6 January 2020, six months before the filing of encl 18, and it states 'pada 24 Oktober 2016, UPC telah mengisukan satu notis 'engineer's instruction' dalam mana UPC memaklumkan bahawa tarikh penyiapan baru yang dicadangkan bagi unit-unit adalah Disember 2018'. In para 3.2 of encl 17, the plaintiff countered that 'Perenggan 5(c) pembelaan terpinda adalah dinafikan melainkan bahawa UPC telah mengeluarkan suatu 'engineer's instruction' ('arahan tersebut') kepada plaintif pada 24 Oktober 2016. Arahan tersebut juga telah dihantar kepada defendan. Menurut arahan tersebut, tarikh penyiapan telah dilanjutkan ke Disember 2018'. My finding in respect of this proposed amendment is similar to the proposed amendment as discussed in sub-para (ii) above in that the fact as to the completion date being extended vide the engineer's instruction dated 24 October 2016 has been adequately pleaded;

(iv) by the proposed amendments to para 9 of the re-amended SoC, the plaintiff seeks to include the statement that the defendant's delay was actually more than three months. Nevertheless, the plaintiff accepts UPC's decision in certifying the defendant's delay as 91 days and there is no change to the particulars of claim for LAD which remains at RM15,000 per day for 91 days; and

(v) by the proposed amendments to para 17.1(a) and (b) of the re-amended SoC, the plaintiff wishes to expand on the prayer for LAD by adding that the order which is sought from the court is for the sum of RM1,365,000 or any other sum as determined by the court as LAD. It is noted that in para 9, the plaintiff had pleaded their entitlement to claim LAD in the sum of RM1,365,000 'dan berterusan sehingga penyempurnaan projek tersebut' against the defendant. By the words as quoted, it is understood that the court may, if at the end of the trial the court finds that the plaintiff has proven their claim on a balance of probabilities, make an order for the payment of LAD by the defendant to the plaintiff, together with interest thereon, in an amount as supported by the evidence adduced at the trial.

[19] The plaintiff contended that the application is made at the early stage of the proceedings as the matter has not been set down for trial and the parties have not exchanged any pre-trial documents or complied with any pre-trial directions. In para 12 of the affidavit in support, the plaintiff's director affirmed that the application was made as soon as the plaintiff had verified the facts regarding the extended completion date with their employees and obtained the relevant documents from Kota Bharu, Kelantan. In view of the movement control orders ('MCO') imposed to curb the Covid-19 pandemic, the said verifications could not be carried out earlier. The defendant however, argued that the plaintiff's reliance on the MCO as an excuse for the delay in

A filing encl 18 is disingenuous and smacks plainly of a tactical manoeuvre. It was contended that the plaintiff is merely relying on particulars or facts introduced by the defendant to bolster the plaintiff's case and/or streamline the relevant facts to the detriment of the defendant.

B **[20]** Whilst it is true that this case is still at the stage of case management and trial dates have not been set, during the case management via e-review conducted by the Deputy Registrar ('DR') on 3 February 2020, the DR had directed that pleadings in Suit No 5 have closed and directions were given for the preparation and filing of the usual pre-trial documents. For Suit No 12, the C DR directed that pleadings will close 14 days from that date ie on 17 February 2020. At the case management on 28 February 2020, which was also held by way of e-review, the DR directed that pleadings in Suit No 12 had closed, and directions were given for the preparation and filing of the pre-trial documents. D The next case management date on 2 April 2020 had to be postponed due to the MCO.

[21] Learned counsels for the parties appeared for the first time before me for case management on 10 June 2020. The plaintiff's counsel informed that the E plaintiff had amended the SoC in Suit No 12 (presumably what was meant was the second amendment on 17 March 2020) and they received the amended defence and counterclaim on 29 May 2020. Therefore, the plaintiff had until 12 June 2020 to file the amended reply to the amended defence and defence to counterclaim. In other words, pleadings for Suit No 12 have not closed. I F directed the parties to attend mediation and set 8 July 2020 as the date for case management by remote hearing for the close of pleadings in Suit No 12 and status update on mediation as well as the compliance with the pre-trial directions for Suit No 5.

G **[22]** On 8 July 2020, the court was informed that the plaintiff had filed encl 18 in Suit No 12. The plaintiff thus, having invoked O 20 rr 3(1) and 12(1) of the RoC 2012 to twice amend the SoC, appears to be bent on having recourse to all rules available under the RoC 2012 to amend the SoC and by H doing so, is putting their case in a piecemeal manner. In comparison, directions for the filing of pre-trial documents for Suit No 5, which is the defendant's claim against the plaintiff, have been given since 3 February 2020. The pre-trial documents cannot be finalised until pleadings in Case No 12 have closed since, with the exception of the bundle of pleadings for each suit, the court had I directed that only one set of pre-trial documents are to be prepared for both suits as they have been consolidated and will be tried together. In addition, trial dates have not been set for the suits owing to the same reason. In my view, therein lies the injustice and prejudice to the defendant.

[23] The plaintiff would naturally be quick to say that even if there is prejudice to the defendant, this can be compensated by costs. In this regard, I would associate myself with the views expressed by Lee Swee Seng J (as His Lordship then was) in paras 37 to 40 at pp 451–452 in the case submitted by the defendant's counsel namely, *Klass Corporation*. In essence, 'justice cannot always be measured in terms of money' and 'costs alone cannot make prejudice caused more prosaic or palatable'. The pre-trial case management under O 34 of the RoC 2012 demands for timeous action and efficiency so that a case may progress to trial and disposed of as speedily as possible.

[24] The plaintiff's action in filing the application in encl 18, which the court, having looked at the probable consequences of the proposed amendments to the re-amended SoC, is of the view that the proposed amendments would be ineffectual and of no value to the plaintiff's case, is lacking in bona fide and was therefore dismissed with cost.

Application dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh